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ALEXANDER J. STEVAS,
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No. 83-1286

In the
Supreme Court of the United States

OCTOBER TERM, 1983

DIRECTOR, Illinois Department of Corrections,
Petitioner,

vs.

PAULA GRAY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
SEVENTH CIRCUIT

SUPPLEMENTAL APPENDIX GIVING THE OPINION
OF THE DISTRICT COURT

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The following is the opinion in the above-entitled action of the United States District Court for the Northern District of Illinois. *United States ex rel. Paula Gray v. Director, Department of Corrections, State of Illinois* (No. 81 C 4545, September 30, 1982). The opinion is unpublished. The decision of the District Court was subsequently reversed by the United States Court of Appeals for the Seventh Circuit. *United States ex rel. Paula Gray v. Director, Department of Corrections, State of Illinois*, 731 F. 2d 586 (7th Cir. 1983). The opinion of the Court of Appeals is given in Appendix A of the Petition for a Writ of Certiorari.

IN THE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 81 C 4545

UNITED STATES OF AMERICA, ex rel. PAULA
GRAY,

Petitioner,

vs.

DIRECTOR, ILLINOIS DEPARTMENT OF
CORRECTIONS, STATE OF ILLINOIS,

Respondent.

MEMORANDUM OPINION AND ORDER

SUSAN GETZENDANNER, *District Judge*:

This petition under 28 U.S.C. §2254 presents a difficult question regarding exhaustion of state remedies. For the reasons stated below the court grants respondent's motion to dismiss.

Petitioner Paula Gray was convicted in 1979 of murder, rape and perjury. According to the state's evidence, Gray and four male companions abducted Carol Schmal and Lawrence Lionberg from the gas station where Lionberg worked the night shift and took them to an empty house in East Chicago Heights, Illinois. Schmal was taken upstairs, raped several times, and then executed by two close-range gunshots into the back of her head. Lionberg was taken into a field and shot to death. Gray was shown to have held a cigarette lighter to provide enough light for her companions to have intercourse with Schmal.

A few days later Gray testified to the foregoing facts before a Cook County Grand Jury. Still unindicted, she testified at a pre-trial hearing for her companions, but at this hearing she recanted, stating that her Grand Jury testimony had been the product of coercion. Gray herself shortly was indicted for her role in the crime, and she was charged with perjury as well. Tried simultaneously with two of her companions, but before a separate jury, Gray was convicted and sentenced to two 50-year and one 10-year sentences, all to run concurrently.

Some time after she recanted her Grand Jury testimony, Gray began to be represented by the same attorney who represented her companions; he continued to represent her through trial. Gray's petition to this court contends that this multiple representation denied her effective assistance of counsel under the Sixth and Fourteenth Amendments.

Gray advances two theories as to how her right to effective counsel was denied. First, Gray argues that under the circumstances of her case the trial court was required to inquire, *sua sponte*, into the adequacy of the multiple representation. Gray relies on *Wood v. Georgia*, 101 S. Ct. 1097 (1981), and *Cuyler v. Sullivan*, 446 U.S. 335 (1980), for the proposition that "special circumstances" can impose such a requirement on a trial court. As special circumstances, Gray points to several comments made at trial, mostly at the hearing of her pre-trial motion to suppress her Grand Jury testimony. Most important were statements that Gray previously had complained of death threats from one of her companions, represented by the same counsel, and statements indicating that counsel may actively have sought

to represent Gray. It also was stated to the trial court that Gray had an I.Q. in the range of 65. Gray argues that these statements, all made on the record, should have alerted the trial court to the possibility that Gray could not receive adequate representation. Gray does not ask the court to find, based on the record, that threats and other improprieties actually took place.¹

Gray's second theory is simply that she in fact was denied effective assistance of counsel because an actual conflict is apparent from the record. Gray argues that the record shows clearly that her counsel was foreclosed from advising her to testify against her companions in return for leniency. For this argument Gray disclaims reliance on any off-record occurrence.²

State prisoners petitioning for habeas corpus relief under 28 U.S.C. §2254 are required first to exhaust all available state court remedies. 28 U.S.C. §2254(b), (c); *Rose v. Lundy*, 102 S.Ct. 1198 (1982). Although the issue of ineffective assistance of counsel was not raised at Gray's trial, she did raise this issue on direct appeal, represented by new counsel. Gray's conviction was affirmed, and she was denied leave to appeal to the Illinois Supreme Court. The United States Supreme Court denied Gray's petition for certiorari. Gray has

¹ At the hearing on Gray's motion to suppress, James Houlihan, a homicide investigator with the Cook County Sheriff's Police, testified that Gray had said she was afraid of Dennis Williams, one of her companions. Gray herself was asked twice whether she had made such a statement, and she denied it both times.

² Arguably, prevailing on her first theory alone, without demonstrating an actual conflict, would not entitle Gray to relief. See *Wood v. Georgia*, 101 S.Ct. at 1104 n.21. The court does not decide this question.

not sought relief under Illinois' post-conviction relief procedure, Ill. Rev. Stat. 1979 Ch. 38, §122-1 *et seq.* Respondent moves to dismiss on the basis that Gray has not exhausted her state remedies.

Proper analysis of exhaustion questions must always begin with the basic proposition stated in the federal statute: state prisoners must utilize available, effective state procedures to raise questions about the legality of their conviction and imprisonment. 28 U.S.C. §2254(b), (c). Illinois courts apply the doctrines of *res judicata* and waiver to bar post-conviction review of claims that were raised or that could have been raised on direct appeal, and the state procedure thus has been held not to constitute an effective remedy where these doctrines will be invoked to bar the claim. *United States ex rel. Barksdale v. Sielaff*, 585 F.2d 288 (7th Cir. 1978), *cert. denied*, 441 U.S. 962 (1979). Direct appeal involves review of record proceedings only, so the doctrines of *res judicata* and waiver do not bar post-conviction review of claims based on matters outside the record. *People v. Stepheny*, 46 Ill. 2d 153, 263 N.E. 2d 83 (1970). Since state post-conviction review is available for claims based on matters outside the record, federal petitions raising matters off the record will be dismissed unless the petition has utilized the state procedure. *United States ex rel. Williams v. Israel*, 556 F.2d 865 (7th Cir.), *cert. denied*, 423 U.S. 876 (1975). The briefs in this case therefore have discussed the question whether Gray's petition does or does not raise claims based on matters outside the record; on this turns the question whether Gray has exhausted her state remedies.

Taken at face value, Gray's petition and memoranda do not raise claims based on matters outside the record.

In fact, they are very skillfully tailored to rely wholly on record matters. Gray's first theory asserts that the trial court should have conducted an inquiry, based on what it knew from record proceedings. This theory relies on *references* in the record to off-record events, such as threats against Gray's life, but the theory rests only on these references; it is irrelevant, taking the argument on its own terms, whether the death threats referred to actually took place. Gray's second theory expressly disclaims reliance on any off-record matters. The court is invited to look only at the trial record to determine that an actual conflict inhered in the multiple representation undertaken by Gray's counsel.

Ordinarily courts decide cases as they are presented by the parties and their counsel. Courts do not usually concern themselves with what additional claims a petitioner might have raised. *Rose v. Lundy* expressly contemplates that petitioners may cure defects in their petitions by omitting unexhausted claims; the court reviewing the cured petition should not be concerned with these omitted claims. 102 S. Ct. at 1204, *see also id.* at 1210-11 (Brennan, J., concurring in part and dissenting in part). In this case, however, Gray has framed her petition in a very awkward way, and the court must hold that it raises unexhausted claims, even though Gray purports not to be raising those claims.

Gray's first theory, as noted above, asserts that certain on-record references to off-record events should have alerted the trial court to the need for an inquiry. In support of this argument Gray offers broad speculations as to the scenario which these on-record references should have suggested to the trial court. This scenario

generally includes that Gray was willing to testify against her companions, but that they threatened her and her family; that she recanted her testimony under these threats; that her companions' attorney somehow succeeded in having Gray and her mother retain him to defend Gray; and that the attorney thereafter made certain that Gray would not testify against his other clients, even if Gray could have obtained some kind of leniency by doing so. Because such a scenario was suggested by on-record comments—which are insufficient to *prove* such a scenario—the trial court, in Gray's view, should have inquired into the matter.

Gray's second theory asserts an actual conflict in the multiple representation. In its consideration of this theory the court is invited to consider only that which fairly appears from the record; that is, the court is asked to consider whether there was an actual conflict without investigating the possibility, asserted elsewhere and only suggested on the record, that one joint client threatened the life of another.

There are several reasons why this court should view Gray's petition as raising unexhausted claims. Such serious allegations of off-record improprieties truly deserve a hearing; a full consideration of Gray's claim really cannot be made based on the record alone. Further, a writ cannot issue from this court without a hearing in which counsel can defend himself against these most serious charges. *United States ex rel. Cosey v. Wolf*, 682 F.2d 691 (7th Cir. 1982). If a hearing is to be held, the state courts should be given the first opportunity to investigate these alleged infirmities in a state prosecution. This, of course, is a central goal of the federal exhaustion requirement. *Rose v. Lundy*, 102

S. Ct. at 1023. It should be stressed that the general rule is that total exhaustion of state remedies is required. The statute recognizes that ineffective remedies need not be pursued, but the court need not honor every attempt to bring a petition within this exception.³

It is important to say a word about *Wood v. Georgia*, 101 S. Ct. 1097, relied on by Gray and arguably the governing precedent for Gray's first theory, that the trial court should have inquired, *sua sponte*, into the multiple representation. In that case Wood and others were convicted and placed on probation while represented by counsel retained by their employer. When they could not pay the fine which was a condition of their probation, their probation was revoked. On a writ of certiorari the Supreme Court reviewed the affirmance of this revocation by the Georgia Court of Appeals. Holding that the trial court should have been alerted by special circumstances to the need for an inquiry into the counsel's effectiveness and loyalty, the Court returned the case to the trial court for such an inquiry. The application of *Wood* to a habeas petition, rather than to direct appellate review, is not clear. See 101 S. Ct. 1104 n.21. In any event, since the relief granted in *Wood*, Gray's own authority, was an order directing a hearing by the state trial court, it does not seem too harsh for this court to ask Gray to seek a hearing in the state courts. If relief is denied, then Gray's petition will stand

³ The statutory test is whether state procedures are ineffective to protect the rights of the prisoner; it is not whether the petition as actually framed and presented to the federal court could be considered in state proceedings.

in a different position with respect to federal exhaustion requirements. The court therefore grants respondent's motion to dismiss.

It is so ordered.

/s/ Susan Getzendanner
United States District Judge

Dated: September 30, 1982